

25 JUN 1971

Post Plea In Court Of Appeals

Following is the text of a memorandum filed by The Washington Post with the U.S. Court of Appeals here in connection with publication of the secret Pentagon documents.

Appellees' Memorandum In Opposition to the Govern- ment's Petition for Rehear- ing and Modification

At approximately 10:30 a.m. today, the attorneys for The Washington Post were advised by the solicitor general that the government was moving in this court for rehearing and modification of yesterday's decision and order; and would seek oral argument thereon. We were advised that the purpose of this move was to put the Post case on the same footing as the New York Times case, because the government was concerned that the situation as it now stands was unfair to The New York Times.

We strenuously oppose this effort at still further delay. The Constitution simply does not permit a prior restraint based on consideration of "fairness" to another litigant.

The government, which has been reviewing the documents since 1969, has had almost two weeks to come up with one instance of substantial peril to the national security derived from the 47-volume history. They have failed to do so. Indeed, in this case, the government offered in the trial court only one document derived from the series which the trial judge himself quickly riddled. (Tr. 132) The government has been afforded every opportunity to prove its case, and it has failed.

The posture of this case is quite different from the New York Times case. There has been here a full hearing on a full record. We submit that the government's procedural problems in New York should not be permitted to delay this case here.*

*Since dictating the foregoing, we have been advised by telephone that the United States has filed a document in the Supreme Court of the United States opposing The New York Times' Application For Vacatur Of Stay Ordered By The Court Of Appeals And Stay Of Mandate Of That Court, in which the government says at page 3:

"In cases dealing with such vital matters of national security, the outcome cannot depend upon the legal nicety that, due to the short deadline under which the government was required to operate in presenting its proof to the district court in the present case, it was unable to prepare a complete submission as it could present with the additional time it had available in the Washington Post case."

Also, we note that this court's concern for the futility of injunctive relief has been further confirmed by the fact that since last evening the Los Angeles Times has published another full story from the subject papers, as have eight of the newspapers in the Knight chain, including the Philadelphia Inquirer, Detroit Free Press and Miami Herald, and that a second story appeared today in the Chicago Sun-Times based on hitherto unpublished material.

Finally, we urge that considerations of judicial efficiency — as well as First Amendment rights—demand summary denial of this motion. This litigation must come to an end. There is neither precedent nor reason in asking a court which has once heard a matter en banc to rehear it again particularly where it is apparent here, from the dissenting opinions, that the court specifically considered and rejected the very relief which the government indicates it will now seek.